A constitutional argument, that preventive detention punishes an accused without a trial, is not overpowering. One answer is that the bail system in some jurisdictions detains those who apparently pose a threat to the community. The prime examples are persons accused of first degree murder, who are often denied bail. Another answer is that preventive detention, by way of civil commitment proceedings, has generally met no constitutional barrier partly because it is not a means of punishing the defendant but of safe-guarding the public. If preventive detention in the proposed system is used for the same purposes, then it also should be held constitutional, especially if the detainees are not placed in a facility housing convicted criminals.

Those who are ultimately detained should be tried quickly. To insure a speedy trial, a time limit should be imposed, and upon its expiration the accused should be freed pending trial, unless he caused the delay. A speedy trial requirement will forestall any use of the preventive detention system as a means to keep undesirables out of circulation. It will also help to make the system unavailable for use as a means of punishment.

Another requirement, which some feel will constrain the state to bring the preventive detainee to trial quickly, is to deduct detention time from his sentence or pay him a per diem rate if he is not convicted. Valid objections to such a suggestion may be raised. In the first place, if detention pending trial is not viewed as punishment, then it should not act to mitigate punishment. Secondly, the mere payment of money will be small solace to a detainee who is found not guilty. However, the greatest objection is that the time deduction and liquidated damages aspects of the plan could influence the enforcement officials and the courts in an undesirable manner. They might too freely detain on the theory that the detainee, whether guilty or innocent, is not grievously harmed by detention. Such an outlook destroys the entire pretrial release system, which should operate to free all who can be freed.

The suggested system does away with monetary bail. Bail arose and flowered during a period when the law had little regard for the rights of the poor. Debtors prisons flourished. Workhouses were used to contain paupers, who were considered a moral pestilence. The adherence to the archaic system of monetary bail is inconsistent with our present legal thinking. The monetary bail system can not long survive the recent recognition of the precept that a poor man is entitled to the same justice as the wealthy man.

Freed & Wald, supra n. 1 at 85 n. 30.

--

CASE NOTE

An editorial comment accompanying a Note represents the opinion of the student who prepared the Note and does not necessarily represent the viewpoint of any other member of the Editorial Board

Edited by
Allen J. Ginsburg

Confessions Coerced Where Made Under Threat Of Dismissal—Garrity v. New Jersey, 87 S.Ct. 616 (1967). Defendants who were police officers, were convicted of conspiracy to obstruct justice in the state court. On certiorari to the Supreme Court they contended that their confessions were obtained by coercion when they were given a choice of testifying against themselves or losing their jobs, under a New Jersey statute dealing with forfeiture of jobs of public employees who refuse to testify on ground of self incrimination.

The Supreme Court, Mr. Justice Douglas writing for the majority, held that the Fourteenth Amendment forbade the states from using the threat of
discharge to secure incriminatory evidence against an employee. In the words of the Court:

The choice given appellants was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in *Miranda v. State of Arizona,... is “likely to exert such pressure upon an individual as to disable him from making a free and rational choice.” We think the confessions were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions. (87 S.Ct. 618-619).

Submission Of A No-merit Letter By Court Appointed Counsel On Appeal Does Not Satisfy Constitutional Requirements—*Anders v. California*, 87 S.Ct. 1396 (1967). Defendant was convicted of the possession of marijuana and appealed. His court appointed counsel, after reviewing the case, advised the court that the appeal had no merit. The defendant wished to proceed with the appeal and asked for another lawyer but was refused. After losing his self-defended appeal he applied for a writ of habeas corpus on the ground that he should have been granted another lawyer for his appeal. The Supreme Court held that the no-merit letter which was submitted to the court was not sufficient to satisfy the defendant’s right to assistance of counsel and equal protection as guaranteed by the Sixth and Fourteenth Amendments.

The Court stated that in order for the indigent to receive equal protection under the law his appointed counsel must act as an advocate rather than as *amicus curiae*. A letter stating that there is no merit in the case without any proof that the appeal is frivolous does not satisfy this requirement. A rich man enjoys the benefit of counsel’s examination into the record, research of law, and marshalling of arguments on his behalf. Thus when the indigent’s counsel merely determines that there is no merit in the case the defendant has not been granted equal protection.

The Court outlined a procedure which it considered to be commensurate with constitutional guarantees. The lawyer must support his client’s appeal to the best of his ability. If he finds the case to be “wholly frivolous”, he should so advise the court and request permission to withdraw. That request should be accompanied by a brief referring to anything in the record that might arguably support that appeal. The court, not counsel, then proceeds to decide, after a full examination of all the proceedings, whether the appeal is frivolous. If it so finds then it can grant counsel’s request to withdraw and dismiss the appeal but if it does not find it to be frivolous, it must afford the indigent assistance of counsel by appointing another attorney.

This requirement would afford the indigent “that advocacy which the nonindigent is able to obtain. ... The no-merit letter affords neither the court nor the client any aid.... The latter must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate.” Finally, the Court states that this procedure would “assure penniless defendants the same rights and opportunities as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel.”

*Roth Test No Longer Determinative—Redrup v. New York*, 87 S.Ct. 1414. In a per curiam opinion reversing three convictions for the distribution of obscene literature, the Supreme Court indicated that for other than “hard core” pornography the Roth test no longer controls as to the question of the state’s power to suppress distribution of books and magazines. The Court stated that whichever of the various standards which the Justices have adhered to for the determination of obscenity is applied, the convictions could not stand. The Court felt that it was significant that “in none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles”, nor was there “any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it”, and finally “in none was there evidence of any sort of pandering”. In the absence of any of the above factors the Court did not deem it necessary to go into the question of whether the material itself measured up to the standards which it had used in the past. Instead of such an individual examination the Court stated that the cases “can and should be decided upon a common and controlling fundamental constitutional basis”. This case indicates that such a basis is one which considers the circumstances surrounding publica-
tion and distribution and the intent of a state to protect its citizens rather than one which looks at the material in a societal void.

Post-indictment Lineup And Right To Counsel—
*United States v. Wade*, 87 S.Ct. 1926 (1967). The petitioner was convicted of bank robbery. During the trial eye witnesses identified the defendant as the robber. The petitioner claims that such evidence should have been excluded because he was exhibited to the witnesses before trial at a post-indictment lineup without notice to, and in the absence of counsel. The Court vacated the reversal by the Court of Appeals and remanded the case to the District Court.

Petitioner’s Fifth Amendment contention was rejected by the Court, citing *Schmerber v. California*, 384 U.S. 737 (1966). *Schmerber’s* holding that compelling one to exhibit his person or to provide a blood, handwriting, or other such sample, does not violate the Fifth Amendment was reiterated. The Court held again that the Fifth Amendment protects one only against testimonial compulsion.

The Court concluded that a police lineup was a critical stage of prosecution at which defendants are entitled to the aid of counsel, as much as at the trial itself. Thus, both the defendant and his attorney should have been notified of the impending lineup; and his counsel’s presence should have been requisite to conduct of the lineup, in the absence of intelligent waiver.

In so ruling the Court distinguished a lineup from systematized or scientific analyses of fingerprints, blood samples, clothing and the like. The Court said that the latter categories are not critical stages of prosecution because the attorney can do nothing to help avoid substantial prejudice to defendant’s rights by being present. Lineups, on the other hand, provide opportunities for such prejudice which an attorney could possibly prevent. There are many overt or covert means of suggestion whereby police can influence a witness’s identification (one of those means cited by the Court was the practice of requiring only the defendant to wear distinctive clothing allegedly worn by the culprit).

Since the defendant is unable to effectively “reconstruct at trial any unfairness that occurred at the lineup”, the presence of counsel is essential to protect his rights. However, in remanding the case the Court stated that absence of counsel may not require reversal if the Government can “establish by clear and convincing evidence that the in-court identifications were based upon observations... other than the lineup identification”. Thus the conviction would be upheld if upon remand the Government could show that the in-court identification was not tainted by the “illegal” lineup, or that if it was, the introduction of the evidence was harmless error.

Illegal Lineup—*Gilbert v. California*, 87 S.Ct. 1951 (1967). The defendant was convicted of armed robbery and murder. Subsequent to his arrest handwriting samples were taken, and he was placed in a lineup conducted without notice to his counsel.

The Court ruled that the taking of handwriting samples did not violate petitioner’s Fifth or Sixth Amendment rights. Citing *Schmerber v. California*, 384 U.S. 757 (1966), the Court held that such samples, in contrast to the content of what is written, are identifying physical characteristics outside the protection of the Fifth Amendment. The Court also held that the taking of the samples was not a “critical stage of the criminal proceedings entitling petitioner to the assistance of counsel” since there was minimal risk that absence of counsel might derogate his right to a fair trial.

The California Supreme Court’s ruling that admission during trial of the accomplice’s statement to the police referring to the petitioner and his part in the crime was harmless error was affirmed by this Court. Certiorari on the issue of an illegal search and seizure was vacated as improvidently granted because of the lack of sufficient facts on the record to decide that question.

The Court, relying on *United States v. Wade*, 87 S.Ct. 1926 (1967), which held that admission of in-court identification of the petitioner was error because it was not first determined whether they were tainted by the illegal lineup. As in *Wade*, this case was remanded for such a determination. The conviction would be vacated if, on remand, it is found that the identifications were so tainted.

As to the admission of testimony of witnesses that they had identified petitioner at the illegal lineup, however, the Court applied a *per se* exclusionary rule. Such testimony is the direct result of the illegal lineup, and therefore necessarily tainted by it. While the in-court identification may be of independent origin from that lineup, the testimony that an identification was made at that lineup cannot be. As such it must be held always inadmissible. Since there was a possibility that the
admission of this testimony might be harmless error, the case was remanded on this point to give the California Supreme Court an opportunity to decide if it was harmless "beyond a reasonable doubt".

Mr. Justice Douglas wrote a concurring opinion in which he stated that he disagreed with the Court with respect to the ruling on the handwriting samples, and would remand for a new trial on the search and seizure point. He felt there were sufficient facts to show the illegality of the search. He said that the doctrine of "hot pursuit" relied on by the California Supreme Court to justify the search, was not applicable here because the officers continued the search after discovering that the petitioner was not at home. In his view, this was merely a search for evidence to link the petitioner with the robbery and was not conducted to expedite the pursuit.

Mr. Justice Black, dissenting in part, stated that he would reverse because the taking of the handwriting samples violated petitioner's Fifth and Sixth Amendment rights. He also disagreed with the Court's exclusion of the in-court identification and with the rationale of this case and of Wade. Mr. Justice Fortas and Chief Justice Warren also dissented in part on the ground that the taking of handwriting samples violates Fifth and Sixth Amendment privileges.

Wade and Gilbert Rules Requiring Exclusion Of Identification Evidence Not Retroactive—Stovall v. Denno, 87 S.Ct. 1967 (1967). Petitioner was convicted of murder and sentenced to death. He then sought federal habeas corpus, claiming that the admission of a witness's identification testimony violated his Fifth, Sixth and Fourteenth Amendment rights. The District Court dismissed, and the Court of Appeals en banc affirmed. The Supreme Court affirmed the dismissal, holding that the rulings in United States v. Wade, 87 S.Ct. 1967 (1967); and Gilbert v. California, 87 S.Ct. 1967 (1967) are not to be applied retroactively.

Petitioner was handcuffed to one of five police officers and brought to the hospital room where the identifying witness was recovering from stab wounds inflicted by the assailant who killed her husband. He was the only Negro in the room, and was identified as the man who committed the offences.

The Court held that the rules requiring the exclusion of identification evidence tainted by the exhibiting of the accused before trial in absence of counsel would not be applied retroactively so as to vacate this conviction or others entered prior to the new rulings.

The Court also held that the petitioner was not deprived of due process by virtue of the fact that he was brought to the hospital room for identification. The Court recognized that under some circumstances, such a confrontation might be so "unnecessarily suggestive and conducive to irreparable mistaken identification" as to violate due process. However, the totality of circumstances in this instance did not present such a case.

Mr. Justice Black dissented, stating that if the identification was not harmless error, the petitioner was denied his right to counsel, and the conviction should thereby be reversed.

Electronic Eavesdropping And The Fourth Amendment—Berger v. New York, 87 S.Ct. 1873 (1967). Petitioner was convicted on two counts of conspiracy to bribe a public official attached to the New York State Liquor Authority. Much of the evidence adduced at his trial consisted of statements made by the petitioner or others and intercepted by the police through use of an electronic eavesdropping device and a recording device. These were installed pursuant to a New York statute providing for the issuance of an ex parte order by a judge, permitting the use of such devices.

Petitioner challenged the constitutionality of this statute and the Court held that the statute was too broad in its sweep, "resulting in a trespassory intrusion into a constitutionally protected area and is, therefore, violative of the Fourth and Fourteenth Amendments. The New York statute provided, inter alia, that upon oath or affirmation by certain named categories of people a judge may issue an ex parte order for eavesdropping. The affidavit must state that there is reasonable ground to believe that evidence of a crime may thus be obtained, and it must particularly describe the person(s) whose communications or conversations are to be overheard, including an identifying telephone or telegraph line number. The order must specify the duration of the use of the device, to last not more than 60 days unless extended.

In pointing out that this statute permits general searches by electronic devices, and was thus too broad to fulfill the requirements of particularity of the Fourth Amendment, the Court pointed out seven basic defects to be found in the statute. They are: (1) there is no requirement that the
affidavit state any particular offense which it is believed has been or will be committed; (2) no requirement that the conversations to be used be particularly described other than whose phone is to be tapped; (3) the authorization of use for two months at a time is equivalent to a series of intrusions, searches and seizures pursuant to a single showing of probable cause; (4) the statute permits extensions of the original two-month period on a mere showing that the extension is "in the public interest" without a showing of present probable cause; (5) the statute places no termination date on the eavesdrop once the conversation sought is obtained; (6) there is no requirement of notice, as is found in conventional warrants, and no requirement of showing exigent circumstances to overcome the need for notice; and (7) the statute does not provide for the return of the warrant, thereby "leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties." In summary, the Court stated that "the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures".

Mr. Justice Black dissented on two grounds. First, he believes that the Fourth Amendment should not be interpreted to include in its prohibition the use of eavesdropping or recording devices. In his view, the Amendment is only so extended by reading into it a right of privacy which he feels is not there to be found. Second, even if the "search" here conducted is governed by the Fourth Amendment, the circumstances surrounding this particular warrant were clearly sufficient to meet the particularity requirement. He agreed with Justice White that the Court erred in determining the validity of the statute on its face without reference to the specific case at bar.

Mr. Justice Harlan dissented, also on two grounds. First, the constitutionality of the statute should be determined in light of the construction given it and limitations placed upon it by the New York State Courts. This, says Harlan was not done by the majority in this case. Second, like Mr. Justice Black, Harlan believes the circumstances presented by this case under this particular statute do not show a violation of the Fourth Amendment.

Use Of Secret Tape Recording Of Incriminating Statements As Evidence—Osborn v. United States, 385 U.S. 323 (1966). Osborn was convicted of endeavoring to bribe a member of the jury panel in the prospective criminal trial of James Hoffa. Osborn, one of the attorneys for Hoffa, had contacted Robert Vick of the Nashville Police Department to make background investigations of those listed on the jury panel. Vick, however, had previously agreed to report any "illegal activities" to federal agents.

Osborn subsequently asked Vick to offer a bribe to one Ralph Elliott to induce him to vote for an acquittal. A tape recording of one of the conversations between Osborn and Vick, made by means of a device hidden on the latter's person, was introduced at trial over Osborn's objection.

The Court rested its rejection of Osborn's contention that the tape recording should have been excluded on two grounds. The first, or broad ground, is that this case falls under the holding in 
Lopez v. United States, 373 U.S. 427 (1963), that "use by one party of a device to make an accurate record of a conversation about which that party later testified," and subsequent use of that recording as evidence, violates no constitutional right of the defendant. Such use of recording devices is to be distinguished from "surreptitious surveillance of a private conversation by an outsider" as was found in 

The second, or narrower ground, is that the use of the recording device in the instant case met the "requirements of particularity" which the dissenting opinion in 
Lopez found necessary". Immediately after the possibility of approaching Elliott was first discussed, Vick reported the conversation to a federal agent. This report was then put in the form of an affidavit and shown to two judges of the Federal District Court. The judges then authorized the use of the recording device to determine the truthfulness of the accusations contained in the affidavit. Because of this "judicial authorization" the Court concluded that the device was used "under the most precise, discriminate circumstances" such as to satisfy the strictest requirements in the protection of constitutional rights.

Petitioner also raised the issue of entrapment, claiming that according to his version of the facts, it was Vick who first suggested the bribe, and that he, Osborn, acquiesced in the scheme only "out of weakness." However, the Court held that it was for the jury to resolve this factual dispute, and affirmed the conviction.

Mr. Justice Douglas dissented on the ground that use of this hidden recording device violated
petitioner's right of privacy under the Fourth Amendment. 

Use Of Government Informer To Obtain Incriminating Statements From Defendant—Hoffa v. United States, 385 U.S. 293 (1966). Hoffa and others were convicted of attempting to bribe members of a jury in a trial of Hoffa for violation of the Taft-Hartley Act. A significant portion of the Government's proof consisted of testimony of one Edward Partin, a Teamster's Union official from Baton Rouge, Louisiana, who overheard incriminating statements made by Hoffa and reported them to federal agents. The Court resolved a preliminary conflict of whether or not Partin was "planted" by the Government by ruling it was immaterial, inasmuch as he was a paid informer at least from the time he entered Hoffa's Nashville hotel suite.

Petitioner contended that Partin's failure to disclose his role as a government informer "vitiated the consent that the petitioner gave to Partin's repeated entries into the suite, and that by listening to the petitioner's statements Partin conducted an illegal 'search' for verbal evidence". Hoffa further contended that use of this evidence at trial violated his Fifth and Sixth Amendment rights.

The Court ruled, however, that the Fourth Amendment protects only the "security a man relies upon when he places himself or his property within a constitutionally protected area;" and that the petitioner herein was not relying upon the security of his hotel suite, but "upon his misplaced confidence that Partin would not reveal his wrongdoing." As such his Fourth Amendment claim was spurious.

As for Hoffa's Fifth Amendment claim, the Court said simply that Hoffa was not compelled to say anything. Lacking compulsion, the Fifth Amendment cannot apply, regardless of how incriminating the statement may be.

Petitioner's Sixth Amendment contention divided itself into two separate claims. The first was that Partin's intrusion upon the confidential relationship of attorney and client violated the privilege. The Court answered this by saying even if there was an intrusion, it could only result in the reversal of conviction in the first trial. Such an intrusion in no way related to or tainted evidence brought out in the second trial based on a totally different charge. The intrusion into this confidential relationship affected only the matters discussed between petitioner and his attorney—the defense to be raised at the first trial. It could in no way work to invalidate other, wholly unrelated evidence.

The second contention was that since the Government had sufficient grounds to arrest Hoffa on October 25, 1962, which arrest would have given him a right to the presence of counsel, any statements made after that date are inadmissible as acquired only by flouting that privilege. In rejecting this contention, the Court said: "There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long."

Mr. Chief Justice Warren dissented on the ground that a conviction should not be allowed to stand where, as here, the Government "reaches into the jailhouse to employ a man who was himself facing indictments far more serious . . . for the purpose of infiltration to see if crimes would in the future be committed". This, according to the Chief Justice is especially so when the reducing of bail and dismissal of indictments against him provide the witness with a strong motive for lying.

Mr. Justice Clark and Mr. Justice Douglas would dismiss because the writs of certiorari were improvidently granted.

Disbarment For Refusal To Testify Or To Produce Records At Disciplinary Proceeding Illegal—Spevack v. Klein, 87 S.Ct. 625 (1967). The Appellate Division of the New York Supreme Court ordered petitioner disbarred when he refused to honor a subpoena duces tecum ordering him to produce demanded records and testify in a proceeding investigating charges of professional misconduct brought against him. Petitioner's sole defense was that such records and testimony would tend to incriminate him. The Court of Appeals affirmed the order of disbarment, and the Supreme Court reversed.

Mr. Justice Douglas announced the judgment of the Court and delivered an opinion in which The Chief Justice, Mr. Justice Black and Mr. Justice Brennan concurred. Mr. Justice Douglas pointed out that Cohen v. Hurley, 366 U.S. 116 (1961), a case practically on all fours with the present case, would have to be overruled since Malloy v. Hogan, 378 U.S. 1 (1964), had held that the Self-Incrimination Clause of the Fifth
Amendment was applicable to the states by reason of the Fourteenth Amendment. Thus the states could exact no penalty which made the exertion of the right to remain silent "costly". In his own words:

And so the question emerges whether the principle of Mallory v. Hogan is inapplicable because petitioner is a member of the Bar. We conclude that Cohen v. Hurley should be overruled, that the Self-Incrimination Clause of the Fifth Amendment has been absorbed in the Fourteenth, that it extends its protection to lawyers as well as to other individuals, and that it should not be watered down by imposing the dishonor of disbarment and the deprivation of a livelihood as a price for asserting it. (87 S.Ct. at 627).

Even though Mr. Justice Douglas explicitly stated that the question of whether a policeman who invokes the privilege when his official conduct is questioned can properly be discharged was not before the court, Mr. Justice Fortas evidently felt that the language of that opinion was so broad as to have answered that question in the negative. He therefore, wrote a concurring opinion in which he stated:

But I would distinguish between a lawyer's right to remain silent and that of a public employee who is asked questions specifically, directly and narrowly relating to the performance of his official duties. . . . This court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his own conduct as a police officer.

But a lawyer is not an employee of the State. He does not have to account to the State for his actions because he does not perform them as an agent for the State. . . . The special responsibilities that he assumes as licensee of the State and officer of the court do not carry with them a diminution, however limited, of his Fifth Amendment rights. Accordingly, I agree that Spevack could not be disbarred for asserting his privilege against self-incrimination. (87 S.Ct. at 630-631).

Mr. Justice Harlan entered a dissenting opinion in which Mr. Justice Stewart and Mr. Justice Clark concurred. The most persuasive point therein was the argument, unrebutted by the plurality, that the present holding was inconsistent with the rule, previously announced by the Court, that it is permissible to deny a status or authority to a claimant of the privilege if his claim has prevented full assessment of his qualifications for that status or authority.

Finally, Mr. Justice White, in a separate dissent, argued that the rule in Garrity so protects the Fifth Amendment rights that the rule of the present case has no legal or practical basis. In his own words:

However that may be, with Garrity on the books, the Court compounds its error in Spevack v. Klein. . . . The petitioner in that case refused to testify and to produce any of his records. He incriminated himself in no way whatsoever. The Court nevertheless holds that he may not be disbarred for his refusal to do so. Such a rule would seem justifiable only on the grounds that it is an essential measure to protect against self-incrimination—to prevent what may well be a successful attempt to elicit incriminating admissions. But Garrity excludes such statements, and their fruits, from a criminal proceeding and therefore frustrates in advance any effort to compel admissions which could be used to obtain a criminal conviction. I therefore see little legal or practical basis in terms of the privilege against self-incrimination protected by the Fifth Amendment, for preventing the discharge of a public employee or the disbarment of a lawyer who refuses to talk about the performance of his public duty. (87 S.Ct. at 636--o37).

The Use Of Perjured Testimony And The Suppression Of Evidence By The Prosecution—Giles v. Maryland, 87 S.Ct. 793 (1967). The defendants were convicted of rape by a Maryland court. They then brought an appeal under the Maryland Post-Conviction Procedure Act, contending that they had been denied Due Process, since the prosecution suppressed evidence favorable to them and knowingly used perjured testimony against them. The trial court agreed with the petitioners as to the first ground, but ruled against them on the second claim—a new trial was ordered. The Maryland Court of Appeals reversed the lower court, and the United States Supreme Court granted certiorari.

The United States Supreme Court vacated the Maryland Court of Appeals' judgment and remanded the case to allow the state court of last resort an opportunity to decide if further hearings should be directed. The suppressed evidence con-
sisted of, firstly, an attempted suicide by the prosecutrix after she had had sexual relations with two men at a party five weeks after the alleged rape. At the hospital the girl claimed she had been raped, but recanted her story and admitted to numerous sexual indiscretions within the last two years. Secondly, the prosecutrix had, one month prior to the alleged rape, been recommended for probation in a juvenile court proceeding, because she was beyond parental control. Lastly, while the present case was pending, the girl was sent to the Montrose School for Girls to protect her from the boys in her locale, who were "harrasing" her. The juvenile court, however, also found she should be confined because she was "out of parental control and living in circumstances endangering her wellbeing."

The United States Supreme Court was very impressed with the fact that the credibility of the witnesses is vastly important in cases of this ilk. The Maryland Court of Appeals felt the suppression of the evidence did not constitute a denial of Due Process since, if admitted, it would not tend to clear the accused. Justice Brennan, writing the majority opinion, framed the issues involved in this appeal as follows: "whether the prosecution's constitutional duty to disclose extends to all evidence admissible and useful to the defense, and the degree of prejudice which must be shown to make necessary a new trial". But, the Court refused to reach these questions because, on evidence which was not part of the record, the Court found that the prosecution had allowed false evidence to go uncorrected in the record. The evidence only went to the credibility of the prosecutrix. This failure on the part of the state is grounds for reversal under the Fourteenth Amendment, said the Court.

The evidence involved consisted of a police report which reflected the results of interviews with the girl and a witness the morning following the alleged rape. In the post-conviction hearing the trial judge refused the defense's motion that the report be produced, on the ground that it was a police work product and not producible under state practice rules. The report showed that the prosecutrix was engaged in intercourse with the witness shortly before the defendants appeared on the scene and allegedly raped the girl. At the trial the testimony of the girl and the witness was in direct contravention to the report.

Justice Brennan noted that this report could have been used to impeach the credibility of the witness and the prosecutrix. The report also indicated the prosecutrix stated that she had not had intercourse with Giles; her testimony was to the opposite.

The opinion stated that since this "supervening matter" had come into the case, it would follow its usual practice of remanding to allow the state court to decide if this new evidence was sufficient to support a finding of prejudice.

Justice White concurred, but felt the report's content as to the activities of the girl and the witness on the night in question could be suppressed. The ground upon which he concurred was that he felt the mental condition of the prosecutrix had not been sufficiently probed by the trial court. And the lack of testimony in this area was not the fault of the accused. The learned Justice then launched into various sections of the record to demonstrate this point.

Justice Fortas concurred due to the failure of the state to disclose to defense counsel the attempted suicide and the dropped rape claim. In effect, he concurred with the holding of the trial judge at the post-conviction hearing. He disagreed with the Maryland Court of Appeals contention that the state need not disclose that which would not be admissible at trial, since the state's duty is to see that the truth emerges.

The state's duty is limited, to data that is "specific, factual, and concrete, although its implications may be debatable." The information in this case bore upon the issue of consent, and Due Process required its disclosure. Deliberate concealment and nondisclosure are indistinguishable from misrepresentation on principle, says this opinion. Then the opinion launches into a discussion on how this point differs from the dissent's position; which is that the state must not knowingly use perjured testimony or leave it uncorrected. The latter proposition the opinion discards on the theory that the purpose of a trial is to ascertain the truth and arrive at a just result. Such a policy requires the state disclose material evidence that can help the defense. "A murder trial...is not a sporting event."

Justice Harlan, with whom Justices Black, Clark and Stewart joined, dissented. In the main the dissent says the majority and Justice White's concurring opinion can find no federal basis for returning the case to the state court.

The majority opinion, notes Justice Harlan, is specious, since the police report was available to the defense during trial, and inspected by the trial
judge at the time of sentencing. The dissent then goes on to explain why the prosecutrix had, mistakenly stated in the interview that the defendant had not raped her. Another point the dissent makes is the other police reports contravene the report that is the center of this controversy. Lastly, the state of Maryland does not allow evidence of prior acts of intercourse to impeach the prosecutrix, hence this part of the report would be inadmissible in any event.

The dissent states that Justice White does not have any federal ground for his decision, but merely feels that the trial judge failed to get enough data concerning the mental state of the prosecutrix. This feeling, claims the dissent, is not sustained by the record.

Justice Fortas's position, says Justice Harlan, is as objectionable as are the others, for reasons noted in the discussion of Justice Fortas's concurrence. At base, Justice Harlan is a proponent of narrow discovery rules, at least until there is more study in the area.

The post-trial indications of promiscuity of the prosecutrix has influenced the majority even though it could find no constitutional breach, to return the case to the state court in the hope that they will also be discomfited and will "discover a formula under which these convictions can be reversed."

Search Of Home By Fraud and Deception Permissible—Lewis v. United States, 385 U.S. 206 (1966). Lewis was convicted on two counts of violating the narcotics laws 26 U.S.C. § 4742(a). At his trial, marijuana purchased from him by an undercover narcotics agent was introduced, along with testimony of statements made by the defendant to the agent. The defendant claims that such evidence is inadmissible because procured through a violation of his Fourth Amendment rights.

On two separate occasions, undercover agent Cass telephoned Lewis, identified himself as "Jimmy the Polack," and stated that he wished to purchase some marijuana. On both occasions Lewis told the agent to come to his apartment where the purchase was to be made.

Petitioner contends that in the absence of a warrant "any official intrusion upon the privacy of a home constitutes a Fourth Amendment violation and that the fact the suspect invited the intrusion cannot be held a waiver when the invitation was induced by fraud and deception".

In rejecting this contention and affirming the conviction, the Court stated that there was no violation of petitioner's Fourth Amendment rights inasmuch as the agent was invited onto the premises for the purpose of consummating an illegal sale of marijuana. The Court distinguished this case from those such as Gouled v. United States, 255 U.S. 298 (1921)—relied upon by petitioner—where, after gaining entry by means of a fraudulently obtained invitation, agents proceeded to conduct a warrantless search. In the instant case the agent did not "see, hear, or take anything that was not contemplated, and in fact intended, by petitioner as a necessary part of his illegal business."

The Court made clear that as long as the agents do not use deception in order to gain entry for the purpose of conducting a search or overhearing conversations, such deceptions would not be "constitutionally prohibited". To hold otherwise, said the Court, would result in a rule "that the use of undercover agents in any manner is virtually unconstitutional per se;" and such a rule would unduly hamper the Government in its combat of organized crime.

Mr. Justice Brennan and Mr. Justice Fortas concurred on the sole ground that petitioner's apartment was not a constitutionally protected area since he opened it up to the public for the transaction of business.

Mr. Justice Douglas dissented on the ground that agent Cass's use of deception to gain entrance to petitioner's home violated petitioner's right of privacy under the Fourth Amendment.

Warrantless Searches By Municipal Health And Safety Inspectors Unconstitutional—Camara v. Municipal Court, 87 S.Ct. 1727(1967); See v. Seattle, 87 S.Ct. 1737 (1967). In Camara, defendant was arrested on a charge of violating the San Francisco Housing Code by refusing to permit a warrantless search of his residence by city health officers. The facts showed that a San Francisco housing inspector was making a routine inspection of an apartment building for possible code violations. He was informed by the manager that the defendant, the lessee of the first floor, was using part of the premises as a personal residence in violation of the Housing Code. When the inspector sought to enter the premises, however, defendant refused to let him in since he could not produce a warrant. This again occurred on two other occasions even though defendant was in-
formed that the inspection was required by law. Defendant was arrested and, while awaiting trial, he sought a writ of prohibition from the California Superior Court, contending that the section of the Municipal Code allowing for warrantless searches is contrary to the Fourth and Fourteenth Amendments. The writ was denied by the state courts, but this was reversed by the Supreme Court, which overruled its prior decision in Frank v. Maryland, 359 U.S. 360 (1959).

The Court found that the basic purpose of the Fourth Amendment “is to safeguard the privacy and security of individuals against arbitrary invasion by governmental officials”. This interest is not met (except in certain “emergency situations” where there is no time to obtain a warrant) unless a warrant is issued upon a showing of probable cause. This is true whether the search is of a criminal nature, as where the police are looking for contraband, or of a civil nature, where health officials are seeking Code violators. “...even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security.” The reasoning in Frank, which found a distinction between this type of situation and a “criminal” search, was fallacious in that any code violation could result in criminal prosecution. Furthermore, a search warrant would give the home owner the added security of knowing whether the inspection is authorized by law, what the limits of the search are, and whether the inspector himself has the power to search. This, the Court felt, would insert a disinterested judicial officer into the picture to determine whether the search is really needed.

The majority held, secondly, that, although a warrant was required in these circumstances, it need not be issued only upon a showing of probable cause as to each particular dwelling. It is sufficient if after an appraisal of the area as a whole, certain minimum conditions are found to exist. The reasons for this are: first, this would be the only acceptable means of achieving the desired results; and, second, this results in a minimum invasion into the privacy of the individual. “Probable cause” for an area search, the court concluded exists where certain administrative or legislative standards for the inspection are satisfied. These standards include, the nature of the buildings; condition of the area, etc.

In See the defendant, a commercial warehouse owner, was convicted for refusing to allow a representative of the Seattle Fire Department to inspect his warehouse without a warrant. The only question presented on appeal was whether the decision in Camara was applicable here. The court, in holding the search unconstitutional, felt that there was no distinction between a warrantless search of commercial property or a residence. “The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property.”

Justice Clark was joined by Justices Harlan and Stewart in a dissenting opinion applicable to both Camara and See. They contended that, since, the Fourth Amendment prohibits only unreasonable searches, there is an area where warrantless entries of this type should be allowed. Here, clearly, the searches were reasonable since there was no indication that they were unauthorized, arbitrary or capricious. Further, the person who is the subject of the search can find out the limits of the search, if the person is authorized, or other questions he might have, by either asking the inspector to display an identification card or calling his supervisor. The dissenters also felt that this extra burden imposed by the majority would greatly hinder health and safety inspections whose importance in our society can be easily documented. Finally, it was argued that since the majority still allowed for the authorization of area searches by magistrates whose expertise in this field is highly doubtful, the provision for warrants would be no more than a rubber stamp.

Search Of Impounded Automobile One Week After Arrest Is Permissible—Cooper v. California. 87 S.Ct. 788 (1967). Defendant was convicted of selling heroin, the conviction resting in part upon a piece of brown paper sack seized without a warrant from a car impounded by the police when they arrested the accused. On appeal, the defendant contended that this search and seizure, which occurred a week after the arrest, was not reasonable within the meaning of the Fourth Amendment of the United States Constitution.

The United States Supreme Court granted certiorari and affirmed the conviction, finding no federal constitutional error. “The meaning of the Fourth Amendment depends upon the facts and circumstances of each case...searches of cars
that are constantly movable may make the search of a car without a warrant a reasonable one...."

The accused argued that the search was not incident to an arrest, and hence was unreasonable. The California Attorney General contended that the California Code allowed the state to impound an auto used to transport, sell or "facilitate the possession of narcotics". Such an auto is impounded so that it may be "held as evidence".

Justice Black, writing the majority opinion, noted that the state statutes do not enter into the Court's deliberation, since the Court determined that, within the facts and circumstances of the case at bar, the search and seizure was reasonable. Cars, which are constantly movable, may make the search of a car without a warrant reasonable albeit "the result might be the opposite in a search of a fixed piece of property".

It is true that the search was not incident to an arrest, but since the car was held as evidence of the narcotics violation, under the dictates of California law, the search was reasonable. To elaborate, Justice Black said, the car was seized "because of the crime for which they arrested petitioner."... The Court stated,

their subsequent search of the car...was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained.... It is no answer to say that the police could have obtained a search warrant, for the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was unreasonable.

Justice Douglas, with whom Chief Justice Warren, Justice Brennan, and Justice Fortas joined, wrote the dissenting opinion. The first point mentioned is that the state did not have title to the car at the time of the search. Secondly, the state statute did not authorize the search. Thirdly, the search was not pursuant to a warrant. Justice Douglas then said, "and since it (the search) was not incidental to petitioner's arrest, it was illegal."

The dissent makes much of the fact that the state statute did not give the state dominion over the auto. Even more important to the dissent's position is the fact that the search was not incidental to the arrest. The dissent concludes that the Bill of Rights applied through the Fourteenth Amendment is applied differently by the majority than if it were applied directly.

Comment: The bone of contention between the majority and dissent is Preston v. United States, 376 U.S. 364 (1964). Although the majority distinguished the Preston case, the dissent disagreed and felt that the cases stood on all fours.

In the field of search and seizure, each case must be decided on its own facts and circumstances, and since the Supreme Court may determine which facts are germane and which are insignificant, it may always distinguish one case from another. True, the general principles may be static, but the Court has flexibility to do justice in each case.

Unfortunately, such an attitude makes it impossible, in many borderline cases, for a policeman to determine whether or not he may make a valid search. One might be tempted to say that such an approach unduly hinders law enforcement, and breeds a contemptuous attitude in the police for a system wherein they can find no rules of a solid nature.

Prior Conviction Admissible For Recidivist Act Where Jury Properly Instructed—Spencer v. Texas, 87 S.Ct. 648 (1967). Three cases argued before the Supreme Court of the United States brought into question the constitutionality of the Texas recidivist procedure under which evidence of prior convictions is admitted to the jury.

In No. 68 petitioner was indicted for murder with malice of his common-law wife. The indictment alleged that he had been previously convicted of murder. In No. 69 petitioner was indicted for robbery, and the indictment alleged that he had previously been convicted of bank robbery. No. 70 involved a third-offender prosecution for burglary which had been finally disposed of but was attacked collaterally in a habeas corpus proceeding. The recidivist statute in question, an enhancement statute, provided that prior convictions should be alleged in the indictment and proved as a matter of fact. The jury was instructed that proof of prior conviction was to be considered only for purposes of assessing the sentence to be imposed and not to establish the defendant's guilt under the current indictment.

In a 5-4 decision the Supreme Court, per Mr. Justice Harlan, ruled that any prejudice arising from this procedure, when compared with the state's interest in controlling recidivism, was not sufficient to require reversal. The majority did not applaud these proceedings—in fact they noted with approval that Texas had since these convictions amended its act to provide for a two step process. However, they felt constrained to allow
the state to devise its own rule of evidence as long as such did not fall below the minimal level the Fourteenth Amendment will tolerate.

State Harmless Error Rules And The Violation Of A Federal Right—Chapman v. California, 87 S.Ct. 824 (1967). Defendants were convicted of robbery, kidnapping and first degree murder. The defendants refused to testify on their own behalf. At the time of trial the state constitution allowed the court, and counsel, to comment upon a failure to explain evidence in the case against a defendant. The constitution also allowed the jury to consider the failure to testify and the ensuing comments. In the case at bar the state and the court commented upon the defendants' failure to testify, and the jury was allowed to draw adverse inferences from this failure to testify. Prior to this case's arrival in the State Supreme Court, the United States Supreme Court, in Griffin v. State, 380 U.S. 609 (1965), held the relevant clause of the State constitution was unconstitutional, because the practice was a penalty on one's right not to be a witness against himself.

In the case at bar, the California Supreme Court held that the petitioners were denied their federal constitutional rights, but the state constitution forbade reversal for harmless errors, and the error in this case was a harmless error.

The United States Supreme Court, on certiorari, considered the questions; whether the violation of the rule could be harmless, and whether the error was in fact harmless. The Court reversed the conviction.

Justice Black, writing the majority opinion, noted that when the violation of a federal right is involved, the state will not be allowed to devise rules to protect its people from violations of federally created rights; the Federal Courts will fashion the necessary norm. The opinion stated that the harmless rule doctrine is constitutional, albeit there are some constitutional rules whose violation always is a “harmful” error. To be harmless in federal eyes, the court must be sure beyond a reasonable doubt that the error was harmless.

Upon a review of the record, the Court held that the error was not harmless because the state did not demonstrate, beyond a reasonable doubt, that the court's instruction and the prosecutor's comments did not contribute to the conviction of the defendants.

Justice Stewart concurred, due to the fact that he felt the harmless error doctrine is inapplicable in questions of violations of constitutional rights, or at least in the Griffin [Griffin v. California, 380 U.S. 609, (1965)] situation.

Justice Harlan dissented, feeling the Court's formulation of the harmless error standard is not the only constitutional one, and that the Court should not assume "what amounts to a general supervisory power over the trial of federal constitutional issues in state courts." The opinion then goes into a discussion designed to prove that the Court was given no such power by the constitution.

The opinion reviews the history of the California rule, and the United States Supreme Court's various formulations of the rule.

Justice Harlan then reviewed the evidence and found the California formulation to be a reasonable one, in the present case's circumstances.

Nolle Prosequi With Leave Violated Defendant's Rights To Speedy Trial—Kloper v. North Carolina, 87 S.Ct. 988 (1967). The defendant had been charged with criminal trespass. At the trial, the jury could not reach agreement and a mistrial was granted. The trial judge continued the case for the rest of the term. Some eight months later the prosecutor asked for and got a further continuance. In August, 1965 about 18 months after the initial trial, the defendant asked that the status of his case be reviewed. The prosecutor then asked for and was granted a nolle prosequi with leave.

The Court characterizes the nolle prosequi with leave as denying the defendant the opportunity to exonerate himself for as long as the prosecutor sees fit. North Carolina argued that while the case could be reinstated the defendant was entirely free to go "withersoever he will." The Court rejected the contention that the pendancy of the case had no affect by referring to possible adverse public scorn, job insecurity (defendant was a zoology professor), and general anxiety and concern.

The Court did not apparently strike down the entire procedure as unconstitutional in all cases but only in the particular facts of the case did the Court feel that the defendant was denied the right to a speedy trial guaranteed under the Sixth Amendment.

Commitment Proceedings Under Colorado Sex Offenders Act Denies Due Process—Specht v. Patterson, 87 S.Ct. 1209 (1967). The defendant was
convicted for indecent liberties under a Colorado Statute which carried a maximum sentence of ten years, but he was not sentenced under it. Instead, defendant was ordered confined under the Sex Offenders Act (Colo. Rev. Stat. Ann. §39-19-1 to 10 (1963)) for an indeterminate term of from one day to life. The Act declares that the procedure which must be followed is:

1. A complete psychiatric examination shall have been made of him (defendant) by the psychiatrists of the Colorado psychopathic hospital or by psychiatrists designated by the district court and

2. A complete written report thereof submitted to the district court. Such report shall contain all facts and findings, together with recommendations as to whether or not the person is treatable under the provisions of this article; whether or not the person should be committed to the Colorado state hospital or to the state home and training schools as mentally ill or mentally deficient. Such report shall also contain the psychiatrist's opinion as to whether or not the person could be adequately supervised on probation.

This procedure was followed by the trial court. Defendant appealed his confinement claiming that this procedure did not satisfy due process because it permitted the critical findings under (1) of the Sex Offenders Act to be made without a hearing at which the defendant could confront and cross examine adverse witnesses and present evidence of his own and because hearsay evidence to which the defendant is not allowed access is admitted.

The Supreme Court reversed the confinement order holding that this procedure did not satisfy due process because there was no right of confrontation, no right to cross examine and no right for the defendant to present his own evidence.

Comment: Since Gideon v. Wainright 372 U.S. 335 (1962), it has been a generally accepted rule that an indigent must be advised of his right to court appointed counsel. In Illinois this is required by Rule 27 (6) of the Supreme Court Rules. This is also required in Federal courts by 18 U.S.CA § 3006. Gideon, however, only required that an indigent who asks for court appointed counsel must be granted one. Since this right can only be waived if there is an "intentional relinquishment or abandonment of a known right or privilege" an individual must be advised of this right so that he can intelligently choose whether or not to make such a waiver. See Johnson v. Zerbst 304 U.S. 458 (1938). This logic can also be applied to the situation in the present case. In Douglas, the Supreme Court extended the right of court appointed counsel to an indigent for an appeal when that appeal is granted to any citizen as a right. The Court there based its opinion on the Fourteenth Amendment, instead of the Sixth as it did in Gideon, reasoning that it would be denying the indigent equal protection if he was not provided with counsel. The right of the indigent to appeal would be meaningless if the poor as well as the rich could not take advantage of it. The Oregon court, however, uses this constitutional distinction to deny an indigent this right. It is true that the right to an appeal is granted by statute whereas the right to an attorney at trial is granted by the Sixth Amendment, but once the right to appeal is given, the Fourteenth Amendment guarantees
that each individual may avail himself of this right. Furthermore, the right guaranteed in *Gideon* is not waived merely because the defendant did not ask for court appointed counsel. He could not waive a right he did not know he had and thus he should have been advised of this right. This becomes especially crucial today when an appeal has become an integral part of the total process of determining one's guilt. The individual with adequate funds can hire a lawyer for his appeal but the indigent may not know that he has a right to court appointed counsel for an appeal. All the guarantees for a fair trial which the Supreme Court has demanded in recent years would become meaningless if an individual is not granted those same rights on appeal. Therefore, the Oregon Supreme Court's decision seems inappropriate in an era when the right of each defendant, rich or poor, to a fair hearing has been so emphasized.

---

**Required Language To Be Adequate Escobedo Warning—** *Commonwealth v. Medina*, 227 A.2d 842 (Penn. 1967). Defendant was convicted of second degree murder. At trial, testimony of statements made by defendant to the police in the absence of counsel was admitted. Twice during the questioning the defendant was warned that he did not have to say anything unless he wanted to.

The Pennsylvania Supreme Court reversed the defendant's conviction holding that the warnings given by the police were insufficient in that the police were under a duty to warn the defendant not only that he did not have to say anything unless he wanted to, but also that anything he said could and would be used against him in court. This complete warning is necessary no matter what the background of the accused is in order to overcome the pressures of in-custody interrogation and to make the accused aware of his privilege and of the consequences of foregoing it.

---

**Tacit Admission Rule Violates Fifth Amendment—** *Commonwealth v. Dravecz*, 227 A.2d 904 (Penn. 1967). Defendant was employed as a laborer by Caisson Corporation which owned a trailer in which were stored many items of construction equipment. Much of this equipment disappeared and part or all of it was found by the state police on a farm owned by the defendant's parents. Subsequently, the police questioned a foreman for Caisson Corporation who gave the police a signed, notarized statement that the defendant had come to him with some of the missing equipment and asked him to sell it. The defendant submitted to questioning by the police and denied that he had taken the tools. The police then brought the foreman before defendant and read the foreman's statement. Defendant made no comment at the end of the reading. At trial this written statement was admitted under the tacit admission exception to the hearsay rule. The defendant was convicted of burglary and larceny and appealed, contending that his Fifth Amendment right against self-incrimination had been violated.

The Supreme Court of Pennsylvania reversed the conviction holding that the tacit admission rule was completely untenable. "A defendant is not required to deny any accusation levelled at him at trial no matter how inculpatory... No inference of guilt may be drawn from his failure to reply" to these charges. Yet under the tacit admission rule, a third person may make an accusatory statement at any place whatsoever and if the defendant fails to answer then the third person's "unmonitored, unauthenticated declaration may doom him."

---

**Corpus Delicti Must Be Proven Independent Of A Confession—** *Commonwealth v. Leslie*, 227 A.2d 900 (Pa. 1967). The defendant was convicted of arson. The evidence was that a fire had destroyed a summer cottage. The state policeman who investigated the fire found nothing to indicate that the fire was caused intentionally, but he had a "hunch" that it was not an accidental fire. The defendant was subsequently arrested for other crimes to which he confessed, these confessions later being proved false. The defendant's description fit that of a person seen in the area of the fire by two neighbors. Defendant confessed that he started the fire, the police again investigated the burned cottage and again could not uncover any evidence to indicate that the fire was started deliberately.

In reversing the conviction, the Pennsylvania Supreme Court held that the only direct evidence of defendant's guilt was his confession. The court agreed that the corpus delicti could always be proven by circumstantial evidence, but held that in the present case the State had failed to show that the fire was a deliberate one. The court held that the State's reliance on the confession alone to prove the corpus delicti was insufficient, and that the state must prove the commission of a crime by evidence other than the confession. The court noted that without this requirement an in-
dividual could confess and be convicted when in fact no crime had been committed.

Search Incident To Informal Detention Permissible—State v. Huffman, 148 N.W.2d 321 (Neb. 1967). Defendant was convicted of breaking and entering and sentenced to 15 years as a recidivist. At the trial his motion to suppress certain bricks, a rifle, and ammunition was denied and defendant appealed contending that the search and seizure of the items was unlawful.

The search had occurred when defendant's car was stopped on the highway after it had been seen at the scene of a breakin, and its description broadcast to other units. One of the officers shined a flashlight into the window of the car and observed the rifle and brick which the defendant reached into the car and handed to the officer. The defendant also took the ammunition out of the glove compartment and handed that to the officer.

The Nebraska Supreme Court affirmed the conviction by holding that “...informal detention is permissible in spite of a lack of probable cause for custody in the spirit of arrest”. The court concluded that since the detention was reasonable the search that accompanied it was also reasonable.

Comment: While the conclusion of the court is correct, their characterization of the detention as having been made without probable cause is strange. The defendant’s car, a 1955 Buick, was seen parked in front of the factory which was subsequently found to have been robbed. The description of the car was broadcast on the radio and the car was stopped by an officer who recognized it as matching the description.

Search Of Car At Station Permissible—State v. Anderson, 148 N.W.2d 414 (Iowa 1967). Defendants were convicted of possession of burglary tools and appealed on the grounds that the search and seizure of the tools at the police station was only a continuation of the search at the station was only a continuation of the search on the road. The court noted that if the search had been completed on the road it certainly would have been permissible, and felt there was no reason why the officers should not be able to complete the search in the warmth and safety of the police garage.

Disclosure Of Identity Of Informant On Issue Of Probable Cause—State v. Jackson, 226 A.2d 804 (Conn. Cir. 1966); McCray v. State of Illinois, 87 S.Ct. 1056 (1967). In the Jackson case the defendant was charged with the sale of alcoholic liquor without a permit and keeping liquor with intent to sell, a misdemeanor in violation of the Liquor Control Act. The arresting officer received information about the sale of alcoholic beverages by the defendant from an informant. The officer gave the informant money to purchase liquor from the defendant and observed the informant go into the defendant’s apartment and come out with a bottle of gin. The officer then went to the defendant’s apartment and placed the defendant under arrest. After the arrest, when the officer asked the defendant if he could search her apartment, she replied: “Go ahead”. A search was made which uncovered a large quantity of alcoholic beverages. The defendant moved to suppress the evidence obtained in the search on the ground that the property was seized without a warrant and that there was not probable cause on which a warrant could be issued.

In denying the motion, the Circuit Court of Connecticut held that no warrant was required since the search was incident to an arrest and the search was reasonable since only specific items were being sought and since the search was not “remote in time and place from the arrest”. The search, then, would be valid if the arrest were a legal arrest, made on probable cause. The defendant contended that the prosecution must disclose the identity of the informant to give the defendant a fair opportunity to rebut the officer’s testimony on the issue of probable cause for the arrest. The court held that disclosure of the identity of the informant was not required since reliability of the informant had
been sufficiently established without disclosure by the testimony of the arresting officer that the informant had given him in the past "... information which has resulted in arrests and convictions [in] several liquor cases". The court treated the issue of reliability "under the particular circumstances" as "... left for the court to decide on a weighing and balancing of conflicting interests".

In the McCray case the defendant was convicted of unlawful possession of narcotics. The arrest was made without a warrant on the basis of information supplied the arresting officers by an informant, who told the officers that the defendant had heroin on his possession and pointed him out to the officers. The officers stopped the defendant on the street and searched him, discovering the heroin. At a hearing on a motion to suppress the heroin as evidence on the ground that the search was illegal for want of probable cause, the two arresting officers testified that they had known the informant for roughly one and two years respectively and that during such periods the informant had supplied accurate information which resulted in several convictions. Both officers, when questioned as to the informant's identity, refused to respond. Objections to the questions were sustained and the motion to suppress was denied.

The Supreme Court of Illinois affirmed the conviction and certiorari was granted by the United States Supreme Court. The petitioner claimed that even though a finding of probable cause was fully supported by the officers’ sworn testimony, the trial court violated the Due Process Clause and the right to confrontation when it sustained the objections to questions concerning the informant’s identity. The Supreme Court affirmed, in a five to four decision, holding in an opinion by Mr. Justice Stewart that the identity of an informant need not be disclosed when the issue is not guilt or innocence but rather the question of probable cause for an arrest or search, saying that "... nothing in the Due Process Clause of the Fourteenth Amendment requires a state court judge in every such hearing to assume the arresting officers are committing perjury". As for the petitioner’s claim that his right to confrontation was violated, the Court held that any contention that the prosecution must produce the informant as a witness was "absolutely devoid of merit".

Mr. Justice Douglas, in a dissenting opinion, in which Chief Justice Warren, Mr. Justice Brennan and Mr. Justice Fortas concurred, stated that the Court’s decision left the Fourth Amendment "... exclusively in the custody of the police" and that without disclosure of the informant "... neither we nor the lower courts can ever know whether there was 'probable cause' for the arrest".

Informant’s Information Sufficient For Probable Cause—State v. Lampson, 149 N.W.2d 116 (Iowa 1967); Commonwealth v. Palladino, 226 A.2d 201 (Pa. Super. Ct. 1967). In the Lampson case the defendant was convicted of breaking and entering. Evidence used by the prosecution had been obtained pursuant to the use of a search warrant. The defendant, after entering a plea of not guilty, filed a motion to suppress the evidence obtained in the search on the ground that the search warrant was issued without probable cause since it was obtained on the strength of the police officer’s affidavit based solely upon information furnished by an informant and not based on any personal knowledge of the officer. The motion was overruled. On appeal, the Supreme Court of Iowa affirmed, holding that "... probable cause mentioned in the Constitution and statute does not have to be shown in the information itself, but may be shown in an affidavit attached thereto, or by sworn testimony taken before the magistrate prior to the issuance of the warrant". In Lampson the police officer upon the application for the warrant told the court of the informant’s reliability on several past occasions and that he had personally dealt with the informant many times. The officer also told the judge in much detail what was observed by the informant which provided the basis for the officer’s suspicions.

In the Palladino case the defendant was convicted of bookmaking and maintaining a gambling establishment. This conviction also resulted from the introduction of evidence obtained in a search pursuant to a search warrant issued on the application of a police officer who attached an affidavit which recited that the information presented for the most part was supplied by an informant known to be reliable and in part by the police officer’s own surveillance. A motion to suppress the evidence resulting from the search was filed and after hearing was denied. On appeal the Superior Court of Pennsylvania affirmed. Judge Hoffman dissented on the ground that the affidavit was insufficient because it, unlike the situation in the Lampson case, rested upon a "... bare assertion of the informant’s reliability" and failed to provide any "underlying circumstances" [Aguilar v. Texas, 378 U.S. 108, 114 (1964)] upon which was based the
informant's information and conclusions or upon which was based the police officer's conclusion of the informant's reliability. The affidavit did not state whether, or upon what circumstances, the informant in the past furnished information, and it did not state that the informant's information was based upon personal knowledge. The affiant, in fact, at the hearing on the motion to suppress, admitted that his information was obtained from another police officer who supposedly dealt with the unnamed informant directly. Judge Hoffman stated that "... the probability that this affidavit rests on multiple hearsay, rooted in conjecture, is too great to be ignored". Judge Hoffman found the officer's personal observations to be without any value.

Local Standards Are To Be Used For Determining Whether A Live Production Is Obscene—Newark v. Humphres, 228 A.2d 550 (N.J. Super. 1967). Defendants were convicted of violating a city ordinance prohibiting a female performer from removing her clothing so as to give an illusion of nudeness or performing any dance, the purpose or effect of which is to direct attention to the breast, buttocks or genital organs of the performer. The conviction was based upon testimony by police investigators who had witnessed the performers, that the defendants had performed the acts proscribed by the ordinance. The court reversed the convictions since it was not established beyond a reasonable doubt that the dominant purpose of the presentations was erotic allurement or that they were so offensive as to warrant conviction.

The basic problem facing the court was how to interpret the Roth [Roth v. United States, 354 U.S. 476 (1957)] test of "contemporary community standards" for purposes of live performances. The court pointed out that there are important differences between material which can be re-examined in court and a live performance, "of which a fleeting moment might have revealed an action or illusion that went beyond propriety." First of all a live performance is "of a vanishing quality, of no permanency, incapable of continuous and successive transmission to other areas of the country in exactly the same form and image from whence it originated." Secondly, "a local theatre performance cannot be foisted upon an unwilling public," as may occur when publications are received voluntarily through the mail. Therefore, the court concluded that "in determining whether a live production is obscene, lewd or indecent, the adop-
tion of local morality at the time and place of exhibition, is the more realistic standard." The court concluded that the performances of the defendants were no more offensive than conduct currently accepted in topless clubs and dance cabarets in the modern metropolis and thus they could not be considered contrary to contemporary community standards.

Manner Of Presentation Relevant To A Determination Of Obscenity—Ferris v. Maryland State Board of Censors, 226 A.2d 317 (Md. 1967). The appellant had submitted to the Maryland Board of Censors for approval a number of silent films which were designed for showing in coin-operated viewing devices in an amusement arcade in an area of Baltimore City known as "the Block". "The Block" contained several night-clubs, book shops, a burlesque house, tattoo parlors and various arcades. The films were viewed in a booth by a single spectator who deposited a coin in a slot which would release a portion of a film for viewing. Each film submitted to the Board showed one or more scantily-clad women, each writhing in various poses, "... clearly inviting and then simulating sexual intercourse". The Board disapproved the licensing of the films on the ground that they were obscene.

In affirming the Board's action, the Circuit Court of Baltimore City admitted evidence as to the character of the neighborhood of "the Block". The Board contended that the manner in which the material is presented is relevant to a determination of obscenity under the test of Ginsburg v. United States, 383 U.S. 463 (1966).

On appeal the Court of Appeals of Maryland affirmed, holding that the manner of presentation, in this case "... the viewing in a booth by a single spectator, in the position of a peeping Tom, who feeds his coins into the machine presumably in the hope that he will be even more titillated by what will come than by what has gone before", is relevant in determining whether the films are an appeal to prurient interest not only under Ginsburg but also under the Roth [Roth v. United States, 354 U.S. 476 (1957)] test before Ginsburg. The Court of Appeals did not "... deem it necessary to decide whether... the location of the booths within the area of 'the Block' constitut[ed] 'pan-
dering' under the Ginsburg doctrine".

Confession Obtained While Intoxicated Inadmissible—Logner v. State, 260 F.Supp. 970
Defendant was arrested on a charge of driving while intoxicated when he became involved in a traffic accident obviously due to over-indulgence which had been witnessed by two police officers. While he was in the police car he made the statement that he could pay for the damage and that they knew where he got the money, evidently referring to a number of recently committed robberies with which he was linked. When they arrived at the police station defendant was interrogated on three different occasions, during which he was informed of his constitutional rights which he waived. During each session the defendant was in a state of intoxication which was recognized by the officers, but they continued to question him. Each time certain incriminating remarks were elicited which were the basis of a later conviction for the robberies. Defendant objected to the admission of the incriminating statements since they were given when defendant was without the aid of counsel and under the influence of alcohol. Defendant was convicted of the offenses and the Supreme Court of North Carolina affirmed. On a petition for a writ of habeas corpus the District Court reversed and remanded.

The court decided, first, that defendant's conviction was based on an involuntary confession and this deprived him of due process of law, regardless of the truth or falsity of the confession and even though defendant may have been guilty of the crime. The coercive nature of the confession was found in the fact that defendant was arrested for drunken driving; that the investigating officer found defendant too drunk to make a statement; that others noted defendant was intoxicated and had the appearance of being under the influence. The decision went on to state that any confession obtained from a person under the influence of alcohol or drugs causes it to be inadmissible. "The petitioner's will had been overborne by the alcohol and drugs. Whether he had a false sense of confidence, ... or an acute sense of remorse, his capacity for self-determination was critically impaired, rendering any confession gained objectionable."

Finally, it was urged by the state that the statements made by the defendant were voluntary since he was warned of his constitutional right to remain silent. This was rejected by the court, since, clearly, defendant was incapable of intelligently or knowingly waiving his constitutional rights.

**Miranda Not Applicable To Prosecutions Of Minor Offenses—State v. Zonconi, 226 A.2d 16 (N.J. Super. 1967).** The defendant was convicted of careless driving and fined one hundred dollars. While in a hospital recovering from injuries received in the accident which led to the charge, the defendant was questioned twice by a police officer and signed a written statement in the presence of members of his family in which he admitted that he had driven the car at the time of the accident. The statement was the state's only evidence that the defendant had driven the car.

On appeal the defendant contended that the statement should have been excluded under the rules laid down in *Miranda v. Arizona*, 384 U.S. 436 (1966). When he made the admission to the police officer, the defendant had no counsel present and had not been informed of his right to counsel or his right to remain silent. The court held that *Miranda* did not apply because the trial took place before *Miranda*. The court, however, went on to say that even if the trial had been after the *Miranda* decision, the decision still would not apply since the defendant "... was not under arrest, in custody, or otherwise deprived of his freedom by the authorities" at the time he made his admission. Further, the court stated that *Miranda* did not apply to motor vehicle violations, which are not criminal. In discussing the inapplicability of *Miranda* to "quasi-criminal" offenses, the court said that there are offenses "... of so common and minor a nature that it would be impractical and unnecessary to bring in the full panoply of constitutional protections in dealing with them".

The court considered the fines and terms of imprisonment under the motor vehicle laws to be "minor" in comparison to those fixed under the criminal laws and that in most cases the defendant can expect only "moderate" fines and not imprisonment. Noting that in the present case the defendant was only fined and not imprisoned, the court referred to the problems that would be encountered if *Miranda* were to be applied "willy-nilly" to all minor offenses, and it seemed to the court that "... the police practices described in *Miranda* as reasons for the adoption of the rules
therein laid down have no pertinence to motor vehicle and similar minor cases”.

Permissibility Of Jury View Up To The Discretion Of The Trial Judge—Battese v. State, 425 P.2d 606. (Alaska 1967). Defendant was convicted of burglary and attempted larceny. The state was permitted to show the jury the place where the crime was committed before any evidence was taken and before the state had established the corpus delicti. In objecting, the defense contended that a jury view was not proper at this stage of the trial and also that there had been material changes on the premises since the burglary had taken place. The court, on appeal, affirmed the trial court’s decision to grant the jury view. It stated that the stage at which a jury should be permitted to view the premises is a matter within the discretion of the trial court, and will be reviewed only for an abuse of discretion. It found no such abuse here, since it made sense to the court to allow the view before the evidence was taken so that the jury could more readily understand the evidence. As to the second contention, the court stated that “a jury view of premises may be allowed even if conditions have changed, if the character of the change is properly brought out in the evidence.” Since photographs taken before the material change in the premises were introduced at the trial the court determined that this condition had been met.

Right Of Defense Counsel To Interview Prosecution’s Witnesses—Gregory v. United States 300 F.2d 185 (D.C.Cir. 1966). Defendant was convicted of first and second degree murder, robbery and assault with a deadly weapon. Defense counsel and the prosecutor appeared before a motions judge before the trial began at which the defense counsel stated that two eye witnesses to one of the crimes refused to talk with him unless the prosecutor was present or authorized the witnesses to talk with him. The motions judge declined to take any action. At trial defense counsel again asked for the judge’s assistance to aid him in interviewing these witnesses. The prosecutor stated that he had told the witnesses they could speak to anyone, but it was his advice that they not speak to anyone about the case unless he was present. The trial judge also refused to assist defense counsel in talking with the witnesses.

The United States Court of Appeals for the District of Columbia reversed defendant’s conviction. One of the grounds for reversal was that even though the prosecutor only advised the witnesses not to speak to anyone about the case without him being present, this advice interfered with the defense’s effective preparation of the case. Citing Canon 39 of the Canons of Professional Ethics and Canon 10 of the Code of Trial Conduct of the American College of Trial Lawyers, the court held that since presumably the prosecutor was unencumbered by defense counsel’s presence during his interview of the witnesses, “there seems to be no reason why defense counsel should not have an equal opportunity to determine, through interviews with the witnesses, what they know about the case and what they will testify to”.

Evidence Obtained In Search Of Defendants’ Trucks Hours After Their Arrest Held Inadmissible—Petty v. State, 411 S.W.2d 6 (Ark. 1967).

Defendants were convicted of burglary and grand larceny for breaking and entering a bowling establishment and taking money in excess of $35.00. Defendants’ trucks had been seen leaving the scene of the crime by the night watchman who gave a description of the vehicles to the police. On the basis of this information, defendants were apprehended and placed under arrest. The arresting officers took possession of the keys to the trucks and turned them over to state police who arrived about six hours later. The trucks were searched at this time and about twelve hours later. Both searches turned up incriminating evidence which was admitted at trial.

On appeal it was contended that the searches violated defendants’ constitutional rights since they were conducted without a search warrant. The court sustained this contention and reversed citing with approval the following from Preston v. United States, 376 U.S. 364 (1964):

The search of the car was not undertaken until the petitioner and his companions had been arrested and taken in custody to the police station and the car had been towed to the garage. At this point there was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime.

Relating this to the case at hand the court said: Obviously there is a striking similarity between the vital facts in this case and the Preston case. There was no search warrant, the men had been arrested, they had no chance to escape, there was a lapse of time (much
more in this case) between the arrest and the search, and there was no chance that the articles recovered would be moved or lost. (411 S.W.2d at 9).

Failure To Admonish The Jury—Stumph v. Commonwealth, 408 S.W.2d 618 (Ky. Ct. App. 1966). During the trial of the defendant on charges of voluntary manslaughter, a spectator shouted out that the witness was lying. Defendant's attorney did not object nor ask that the jury be admonished not to consider the outburst. Nevertheless, the appellate court reversed the sentence and remanded the case for a new trial stating that the trial judge should have admonished the jury even without having been requested to do so, and its failure to do so constituted reversible error.

Prior Grand-Jury Service Does Not Disqualify Petit Juror—State v. Riley, 151 S.E.2d 308 (W.Va. 1966). Defendant, a school superintendent was convicted of embezzling funds of the Board of Education. During the voir dire examination a number of jurors were challenged for cause; two of them because they had served on the grand jury which indicted the defendant of a related crime, involving the embezzlement of funds from the same source. The trial court accepted these jurors after they said they would give the defendant a fair trial and would not convict him unless he was proved guilty beyond a reasonable doubt. The Supreme Court of Appeals affirmed the conviction holding that prior service on a grand jury which indicted a defendant of a similar crime does not disqualify a person from sitting on a petit jury. The Court found that even though such a juror may be excused without causing error, failure to excuse is not grounds for reversal. In the absence of a showing that a juror has formed an opinion as to the guilt or innocence of this defendant or that the juror would be in some way partial, the court should not disturb the discretion exercised by the trial court in determining the question of eligibility of the member of the jury.

Polling And Instructing The Jury Did Not Cure Prejudice—Cabbiness v. State, 410 S.W.2d 867 (Ark. 1967). After defendant had been arrested for the burglary of a produce store, the police returned to his apartment, searched it without a warrant, and found a revolver and some clothing. Before trial the defense attorney moved to suppress this evidence as fruit of an illegal search. The trial judge refused to pass upon the motion, saying that it was premature and that he would rule on the admissibility when the evidence was offered. When it appeared that the State was about to introduce this evidence, defendant again objected and requested that testimony as to the admissibility of the evidence be heard in camera. This request was denied and the witness was permitted to describe the revolver and the other articles that had been found in defendant's apartment. After the matter had thus been brought to the attention of the jury, the trial judge finally sustained the defense objection.

Despite this ruling the prosecutor later asked another witness if the revolver was loaded. The defendant's objection was sustained but his motion for a mistrial was denied. Instead the trial judge polled the jury and was assured by each one that he could ignore the references to the revolver.

In reversing the lower court's judgment of conviction the court said in part:

We are inclined to think that, on balance, the court's polling of the jury tended to emphasize the error rather than to correct it. Only a very unusual and very conscientious juror would publicly confess himself to be so weak-minded as to be unable to obey the court's admonition to disregard certain testimony. The sure way to avoid the possibility of prejudice is to exclude the incompetent evidence in the first place.

Aranda Decision Concerning Co-Defendant's Confession To Be Applied Retroactively—People v. Charles, 425 P.2d 545 (Cal. 1967). Prior to this case the Supreme Court of California, in People v. Aranda, 407 P.2d 265 (1965), outlined certain rules to alter the practice of introducing confessions which implicated co-defendants. It was held that the trial judge should determine whether all parts of each confession implicating the nondeclarant could be effectively deleted without prejudice to the declarant. If this could not be done, he must either exclude the confessions or sever the trials. The co-defendants in this case were tried and convicted of armed robbery before the Aranda decisions. Both defendants had confessed and the confessions were admitted into evidence. The trial judge, however did not follow the Aranda safeguards. The California Supreme Court held that Aranda applies to cases on appeal even for pre-Aranda trials. The conviction of Charles, however, was affirmed since he had made an in-
dependent confession under the constitutional safeguards applicable at that time.

The Court stated that this Court and the Supreme Court of the United States have both followed, "the historic practice of applying this current expression of the basic principle to cases pending on appeal." (The court added that Miranda and Escobedo were exceptions to this principle because of the unique circumstances in which those decisions arose.) The Court stated that its characterization of Aranda as not being constitutionally compelled did "not bear upon the applicability of this case on appeal but only upon its automatic availability for collateral attack." As to the distinction between substantive and procedural rules the court stated that they are so "interwoven that their attempted segregation into clean cut categories becomes meaningless; ... the hoary dichotomy between the substantive and procedural cannot serve as a talismatic solution to the retroactivity problem."

Facetious Remarks By The Trial Court Judge To The Jury—Smith v. State, 410 S.W.2d 126 (Ark. 1967). Defendant was convicted in the Circuit Court of Marion County, Arkansas, for grand larceny of three hogs, and sentenced to one year in jail with a recommendation that upon restitution the sentence be suspended. On appeal, the defendant alleged inter alia that various remarks by the trial judge influenced the jury's verdict.

After reviewing the colloquy between the judge and the jury, during the period when the jury had returned from deliberation to request further instructions from the court, the Supreme Court of Arkansas determined that the trial court's remarks had influenced the jury's verdict. Since the jury was influenced, the court ordered the conviction reversed and a new trial.

The dialogue which the court found prejudicial is too long to be set out here verbatim. However, the exchange occurred because the jury wished to find the accused guilty but not sentence him to prison. When asked about the effect of a recommendation of leniency, the court answered that it was not bound by, but would give consideration to such a recommendation. The jury retired, and later returned to ask if a finding of guilty, fixing zero years punishment and restitution to the aggrieved, was acceptable. The judge replied that it was not, and that the zero years punishment was a recommendation which did not bind him. When told this was the holding of the jury the judge noted that the jury apparently did not trust him. The jury then returned to the deliberation room and later returned its verdict of guilty with a recommendation of leniency.

The court noted its "zealous" stand against any trial judge's remarks that "might influence" a jury's verdict. It stated that "facetious or not, the words of the trial judge in the background of the previous statements on the subject were prejudicial", since facetious remarks are not always taken as such by the hearers.

Although the prior point was dispositive, the court went on to discuss the appellant's objection to the trial judge allowing the sheriff to select two jurors of his choice from the special panel of twenty-five provided by the jury commissioners to be used when the regular panel was depleted. The basis of the defendant's objection was that "the sheriff was prejudiced because he was a prosecuting witness". The Court stated that possible prejudice is not enough, actual prejudice must be shown. In addition, the record failed to reflect that the appellant had no preemptory challenges available to object to the proffered jurors.

Emergency Situation Validates Search Without Warrant—Patrick v. State, 227 A.2d 486 (Del. 1967). Defendant was convicted of second-degree murder for beating his victim to death with a brick. The evidence showed that on the night of the murder, defendant and the victim had had an argument after which defendant entered the room in which the victim was sleeping and beat him about the head with a brick. The victim was found the next morning by his employer who was not sure he was dead. The police were summoned and informed that a man had been beaten and might be dead. They thereupon entered the room where the body had been found and determined that the victim was indeed dead. While in the room the police found fragments of the brick and took pictures of the scene. No other search was made.

On appeal defendant contended that all evidence obtained by the officers who entered the room where the body was found was inadmissible since no arrest was made and no search warrant for the particular premises was outstanding. In rejecting this contention the court stated that the general rules governing search and seizure are subject to the exception of emergency situations, sometimes called the "exigency rule." The circumstances described amounted to just such an emergency.
situation, and hence evidence found in plain sight was admissible when gathered pursuant to such lawful entry. In the words of the court:

Clearly, the police had a good reason to believe that a life was in the balance and that emergency aid might be needed. Under the circumstances, it was the duty of the police to act forthwith upon the report of the emergency—not to speculate upon the accuracy of the report or upon the legal technicalities regarding search warrants. It follows that the entry by the police was reasonable and lawful.

And further:

The preservation of human life is paramount to the right of privacy protected by search and seizure laws and constitutional guaranties; it is an overriding justification for what otherwise may be an illegal entry. It follows that a search warrant is not required to legalize an entry by police for the purpose of bringing emergency aid to an injured person.... And the criterion is the reasonableness of the belief of the police as to the existence of an emergency, not the existence of an emergency in fact. 227 A.2d at 489.

Blood Samples Taken Thirty-Eight Days Prior To Arrest And Without Consent Inadmissible—State v. Davis, 226 A.2d 873 (N.Y. 1967). Defendant was involved in an automobile collision on a public highway and immediately taken to the hospital. While there a number of blood samples were taken without his consent, and two were sent to the police laboratory. They were found to contain a substantial alcoholic content and as a result an arrest warrant was issued 38 days after the accident occurred. At his trial defendant objected to the admission of the testimony of the doctor who authorized the blood sample on the grounds that no consent was given. The evidence was admitted and defendant was convicted of operating a motor vehicle while intoxicated.

The New Hampshire Supreme Court reversed and remanded, holding that any testimony regarding the blood samples was inadmissible. Where no consent is given to the taking of blood, this can only be done subsequent to or contemporaneous with a lawful arrest. In this case no consent was given, nor was there proximity between the arrest and search, either in time or place. As the court pointed out, "It 'will not do' to justify an arrest by a search and the search by the arrest".

Admission In Evidence Of A Similar Subsequent Offense And Defendant's Acquittal—People v. Griffin, 426 P.2d 507 (Cal. 1967). Defendant was convicted of first degree murder and sentenced to
death. On appeal, the accused claimed, *inter alia*, that the trial judge erred when he allowed evidence of a similar subsequent offense to be admitted but excluded evidence of the defendant's acquittal of that offense.

Chief Justice Traynor, speaking for the Supreme Court of California agreed with the appellant. The evidence of the subsequent crime, due to its similarity with the crime charged, was admissible.

The trial court erred, however, in excluding evidence on the issue of guilt that defendant was acquitted of the subsequent crime by a Mexican court. Although there is authority to the contrary...the better rule allows proof of an acquittal to weaken and rebut the prosecution's evidence of the other crime.

The State contended that the acquittal was the hearsay opinion of another fact finder drawn from the evidence adduced at the trial. This objection was easily met by the Court, which relied upon the official document exception to the hearsay rule.

It should be noted that in the case at bar a pivotal point was the proof of intent and the proof of the Mexican crime was critical, in the eyes of the Court. "Had the jury been allowed to consider the determination of the Mexican tribunal, its consideration of the evidence of that crime would have been materially affected." Under California law the error must result in a miscarriage of justice before the verdict is reversed. The majority felt there had been such a miscarriage since, if the evidence in dispute had been admitted, there is a *reasonable possibility* that the jury would have reached a result more favorable to the accused.

Speed Detection By Radar Devices Upheld—

*Honeycutt v. Commonwealth*, 408 S.W.2d 421 (Ky. App. 1966). Defendant was found guilty of speeding. At trial the arresting officer testified that a radar device had registered the fact that an auto driven through the radar field. The court gave strong support to cases holding that the accuracy of the radar may be tested by a calibrated tuning fork alone because its accuracy is assumed in the absence of an attack by defendant. [Citing *State v. Tomanelli*, 153 Conn. 365, 216 A.2d 625 (1966).]

**Failure To Prove Continuous Custody Of Breath Test Specimen Does Not Render It Inadmissible—**

*State v. Nagel*, 226 A.2d 524 (Conn. Cir. Ct. App. 1966). Defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor. On appeal he contended that the failure of the State to prove continuous custody of the breath sample, after it was taken, rendered the results of subsequent tests inadmissible. The evidence showed that on the day of the arrest the officer who administered the test sealed the kit, affixed the identification number "NM9" and prepared it for mailing. The officer remembered putting the kit in the office safe but did not recall who mailed it to the state toxicologist. The kit bearing number "NM9" was received three days later by the toxicologist with the seal unbroken.

On appeal the court held that this statement of the facts did not reveal any proof that the kit had actually been tampered with. Thus it assumed that the test was accurate and rejected defendant's contention. In the words of the court:

It is not necessary to show that there was an entire absence of opportunity for anybody to tamper with it; it is only necessary to show that the circumstances were such as to establish a reasonable assurance that it was the same and in the same condition. (226 A.2d at 526).

Improper Acceptance of Guilty Plea—

*People v. Goldfarb*, 148 N.W.2d 241 (Mich. Ct. App. 1967). Defendant was charged with breaking and entering
and possession of burglary tools. He pleaded guilty to the charge after having discussed it with his attorney and in the presence of the attorney. The District Court judge inquired of the defendant as to the voluntariness of the plea and then accepted it.

The Michigan Court of Appeals reversed the conviction on the grounds that the judge’s question to the defendant “Your counsel advises the court that you wish to plead guilty to possession of burglary tools, is that correct?”, was inadequate to advise the defendant of the nature and elements of the crime he was charged with and therefore vitiated the guilty plea. The court acknowledged that able counsel was present and that the defendant had been in jail before, but stated that the requirement of giving adequate warning of the nature of the crime was mandatory regardless of any other factors and regardless of who the defendant was.

Comment: The dissent felt that this statement of the charge while not adequate for an unrepresented youth, was certainly adequate for a man with a 20 year criminal record and able counsel. The dissent felt that the intent of the statute was fulfilled even if the formalities were not.

Indigence Is Relative—State v. Tahash, 148 N.W.2d 557 (Minn., 1967). Defendant was convicted of grand larceny and appealed on the grounds that he was denied fundamental fairness. One of his specific contentions was that he was not given appointed counsel after requesting it. At the time of the request the probate court, which apparently had conducted certain pretrial procedures, found that since the defendant had $25.00 in cash, a seven year old car, and some equity in 120 acres of land he was not indigent and therefore not entitled to appointed counsel.

The Minnesota Supreme Court reversed and remanded the case, mainly on other grounds. In discussing the indigency issue the court held that the probate court had been in error and quoted the United States Supreme Court in Hardy v. United States, 375 U.S. 277 (1964), that “An accused must be deemed indigent when at any stage of the proceedings (his) lack of means...substantially inhibits him”.

No Advice Of Right To Appointed Counsel For Appeal—State v. Gruver, 148 N.W.2d 405 (Iowa 1967). Defendant pleaded guilty to a charge of forgery and was sentenced to a term of not more than 10 years. Defendant appealed pro se and among his contentions was that he had been denied appointed counsel.

The Iowa Supreme Court noted that the defendant had court appointed counsel when he pleaded guilty. The court stated that a defendant is only entitled to counsel on appeal when he specifically requests it and held that the lower court was under no obligation to advise the defendant that he had the right to make the request and that counsel would be appointed if he did so.

Comment: The Iowa Supreme Court cites several of the United States Supreme Court decisions in this area of the right of counsel and points to the fact that nowhere in the language of the cases is there a requirement that the defendant be advised of his right to appointed counsel on appeal. While it may be true that none of the cases require, as a constitutional standard, the advising of the defendant of this right, the decision of the Iowa court is certainly a step backwards from the ob-
vious intent of these cases to provide all persons an equal opportunity to obtain justice.

---

Mere Appearance At Trial Without Counsel Not Deemed An Effective Waiver Of Right To Counsel —Cuevas v. Wilson, 264 F.Supp. 65 (N.D. Cal. 1966). Petitioner in 1963 was convicted in California of two counts of unlawful sale of narcotics. California law required the state to impose a heavier sentence where the defendant had previously been convicted of a similar offense. The petitioner had a similar prior conviction in 1958. In a habeas corpus proceeding the petitioner alleged that he was in custody in violation of his constitutional rights because in the 1958 prosecution he was denied counsel at a critical stage of the criminal proceedings, and if the 1958 conviction were to be set aside he would have been illegally sentenced as a second offender in 1963 and entitled to apply for immediate release on parole.

In the 1958 prosecution the petitioner was provided with counsel from the public defender’s office. Petitioner appeared in court and pleaded not guilty and was subsequently released on bail. Later the petitioner again appeared in court and was told by the judge that as he had been bailed out it was “no longer a case for the Public Defender”, whereupon the public defender’s office was relieved from further representation of the petitioner. The court, however, did ask the petitioner if he desired to secure his own attorney. The petitioner responded affirmatively and a date for the trial was set. The petitioner appeared on the trial date unaccompanied by an attorney and changed his plea to guilty, which was accepted and entered by the court. The court did not ask the petitioner whether he had an attorney, whether he could afford an attorney or whether he wished to proceed without an attorney. The United States District Court held that the petitioner was denied his constitutional right to counsel since the “. . . petitioner’s mere appearance in court without counsel cannot be deemed to constitute an effective waiver of his right to the assistance of either appointed or retained counsel”.

---

Reacquisition Of Jurisdiction Over An Extradited Prisoner—Shields v. Beto, 370 F.2d 1003 (5th Cir. 1967). Petitioner was convicted in Gray County, Texas, for two felonies, in May, 1933, and sentenced to a total of twenty years in prison. In November of the same year petitioner was convicted in Wheeler County, Texas, for a felony and sentenced to twenty years in prison to be served consecutively to the first two convictions. After serving approximately one year of the forty-year term, the Governor of Texas granted the prisoner a short “furlough”, and notified Louisiana law-enforcement authorities because the petitioner had escaped from a Louisiana penal institution prior to his Texas convictions. Rather than accepting the “furlough”, the prisoner signed a waiver of extradition and served his sentence in Louisiana. He was released from the Louisiana penitentiary on parole, which was concluded in 1948. Petitioner was subsequently convicted of passing a forged instrument. Petitioner was sentenced to two years plus the time not served for the 1933 convictions.

The prisoner applied for a writ of habeas corpus to the Texas Court of Appeals because of his incarceration for the 1933 convictions. The writ was denied. The prisoner then applied for a writ of habeas corpus on the grounds that his incarceration under the 1933 Texas convictions was a violation of his Fourteenth Amendment right of Due Process. The United States District Court for the Southern District of Texas denied the petition. On appeal the United States Court of Appeals for the Fifth Circuit reversed the lower court, holding that “the extradition of Shields to Louisiana authorities and the release by Texas of the prisoner before expiration of his sentence constituted a waiver of jurisdiction over Shields”.

The court, after some introductory remarks about Due Process and fundamental justice, reviewed the case law and came to the conclusion that Texas had, in effect, impliedly pardoned the petitioner when it allowed him to be extradited while serving a prison sentence. The Court placed heavy reliance upon the fact that the surrendering state at the time of extradition;

showed no interest in the return of the prisoner, either by agreement between the sovereigns, by detainer, or any other affirmative action taken by it following his release in Louisiana.

The other factor which the court stressed was that the lack of interest demonstrated by the State of Texas lasted twenty-eight years. “A prisoner cannot be required to serve his sentence in installments” are the words the opinion used to sum up its feelings on this point.

Since the lack of interest for a long period of time was held to be equivalent to a pardon or commutation, and a waiver of jurisdiction, the Texas court which heard the forgery case in 1960
was without power to force the petitioner to serve the balance of his 1933 sentences.

Equal Protection And The Unequal Treatment Of Those Who Can Not Procure Bail—Priest v. State, 227 A.2d 576 (Del. 1967). Defendant was arrested and charged with auto theft. Bail was set at five-hundred dollars. The accused was unable to post bail. During the ensuing detention, Priest was interrogated heavily, and in violation of various statutory and court propounded rules. After five months of imprisonment, the defendant was tried and convicted. He was given a suspended sentence and probation. On appeal, the defendant contended, *inter alia*, that he was denied Equal Protection of the law "in that, because he was unable to furnish bail, he was subjected to police interrogation to which another defendant, able to post bail, would not have been exposed."

Justice Hermann, writing a unanimous opinion for the Supreme Court of Delaware, stated that "the defendant cites no authority in support of this argument. The contention is without merit."

The opinion continued that the Equal Protection Clause does not necessitate that all have the same rights and protections, but that all be treated identically as to the "privileges conferred and liabilities conferred." This Court felt that "it forbids invidious discrimination, but doth not require identical treatment for all persons without recognition of differences in relevant circumstances." The Clause, the Court said, prevents invidious discrimination. The Eighth Amendment of the Constitution permits the discriminatory classification between those who can obtain their release on bail and those who can not. Hence, this classification is not prohibited by the Constitutional Clause of Equal Protection.

Quoting the case of Rigney v. Hendrick, 355 F.2d 710 (3d Cir. 1965), the Court said, "the Constitution, however, permits such a classification, and any differences here, arise solely because of the inherent characteristics of confinement and cannot constitute invidious discrimination."

Comment: The accused was placed in jail pending trial. Jail is a place where convicted criminals are placed to be rehabilitated and punished. The accused was incarcerated because he could not adequately assure the court that he would appear at his trial. Should he then be placed in a jail? Does not jail restrict the accused to a greater extent than necessary to insure his appearance in court?

Another point is that even if the incarcerated can be discriminated against under the Constitution, surely he can not be prejudiced to such a degree that he will be convicted where a man freed on bail would not be convicted. Such a disadvantage to the poor is unthinkable in our present system.

Felony-Murder Rule Encompasses Accidental Killing During Robbery Escape—Whitman v. People, 420 P.2d 416 (Colo. 1966). The evidence advanced at defendant's trial tended to show that he and another party undertook to rob a creamery. Although the other person actually perpetrated the holdup, he used defendant's gun and defendant drove the car which enabled them to escape. The police were signaled by the victim and began chasing the robbers. During the chase defendant's car struck another car killing the driver. Defendant was arrested and convicted of felony-murder under a Colorado statute which provides, that a "Murder . . . which is committed in perpetration or attempt to perpetuate any . . . shall be deemed murder in the first degree." Defendant contended on appeal: (1) that there was insufficient evidence to show that a murder was committed in perpetration of the robbery; and (2) that the "perpetration of a robbery" does not encompass the subsequent escape.

The Colorado Supreme Court affirmed defendant's conviction, holding that the felony-murder doctrine eliminates the necessity of proving the elements of deliberation and design to effect death under the statute. It quoted Andrews v. People, 33 Colo. 193, 79 P. 1031 (1905) for this theory. The Andrews court held that "the purpose of the statute was to make every homicide committed in the perpetration or attempt to perpetrate certain felonies, murder, which may be punished by death, if the jury so determine, without regard to malice, deliberation, or premeditation".

The majority of the Colorado Supreme Court went on to hold that the escape is as much a part of the perpetration of the crime as the actual holdup itself. This is true even under the more lenient "furtherance of the felony" test adopted by prior Pennsylvania cases. See, Commonwealth v. Redline, 391 Pa. 486, 137 A.2d 472 (1958).

Court's Right To Limit Press Coverage Within Courthouse Upheld—Seymour v. United States, 373 F.2d 629 (5th Cir. 1967). Defendant was convicted of criminal contempt when he disobeyed a standing